

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## **Advice Memorandum**

DATE: April 12, 1996

TO : Veronica Clements, Acting Regional Director  
Region 27

FROM : Barry J. Kearney, Associate General Counsel 378-2878  
Division of Advice 512-5072-0100  
512-5072-8400

SUBJECT: Technology Service Solutions 512-5078-7000  
Case 27-CA-13971 625-8817-2000

This Section 8(a)(1) case was submitted for Advice as to whether the Employer should be required to provide the Union, upon request, with a list of employee names and addresses since the Union has no alternative means of communicating its organizing message to the Employer's employees.

### **FACTS**

#### **a. Employer Operations**

Technology Service Solutions (the Employer), a partnership of IBM Corporation subsidiaries and Eastman Kodak Company, began operations on January 1, 1994. The Employer installs, services and repairs computer systems nationwide. The Employer is headquartered in Wayne, Pennsylvania.

The Employer is organized into three functional groups: the PC Work Station Group, the Point of Sale Group, and the Network Group. The PC Work Station Group installs and services personal computer systems for business enterprises. The Region involved herein, the South Central Region, is overseen by a Regional Manager, and maintains its Regional Office in Englewood, Colorado. The South Central Region encompasses the States of Colorado, New Mexico, Kansas, Oklahoma, Missouri, Arkansas, and areas surrounding Laramie and Cheyenne, Wyoming and Chardon, Nebraska. The Region is further divided into nine territories, which are overseen by nine first line supervisors known as Customer Service Managers (CSMs).

The CSMs are responsible for supervising the day-to-day operations of the Employer. Supervised by the CSMs are Customer Service Representatives (CSRs), the employees involved herein and the functional foundation of the enterprise. CSRs perform all of the installation, service and repair. Each CSM supervises between 20 and 27 CSRs. CSRs perform their duties in specific geographic areas located within their CSM's territory.<sup>1</sup> CSRs, like CSMs, function entirely out of their homes and cars.<sup>2</sup> Neither CSRs nor CSMs physically reports to a central location. Except for the Regional Office, the Employer maintains no offices in the Region. There are 236 CSRs employed in the South Central Region.

CSRs receive assignments and communicate with the Regional Office, the Employer's Problem Resolution Center,<sup>3</sup> CSMs, and other CSRs (where possible) through a computerized wireless dispatch system that operates via radio waves. Each CSR is outfitted with a portable terminal, referred to as "the brick," which enables the CSRs to both receive and send dispatch messages, order parts, and document work assignments. The brick's communication capabilities are dedicated and limited to the universe of Employer operations.<sup>4</sup> Bricks are not designed to, nor do they, permit CSRs to transmit or receive

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<sup>1</sup> Approximately 25 CSRs, when necessary, work in geographic areas other than their "home" areas to provide specialized services or assist in large installations.

<sup>2</sup> The attached map, Exhibit A, depicts the entire South Central Region. Dots and circles indicate the location of CSRs. Squares indicate parts storage locations.

<sup>3</sup> The Problem Resolution Center is located in Memphis, Tennessee, and exists to provide technical assistance when sought (over the telephone) by CSRs.

<sup>4</sup> CSRs are dispatched to customers via the brick, after customer needs are communicated via an "800" telephone number. The dispatch of individual CSRs is determined through complex computer analyses, which accounts for geographic location, skill, and availability.

information via modem.<sup>5</sup> It is primarily through the brick that CSRs interact with other elements of the Employer, including (where possible) other CSRs. CSRs are identified by number on the brick and can be contacted on the brick only through the use of those numbers. CSRs are able to obtain the identification numbers of other CSRs within their own territory, but not within any other territory or within any other Region. CSRs are provided no other information about their co-workers.

Beyond communication on the brick, there are few incidents of interaction between CSRs or between CSRs and other elements of the Employer. CSRs receive and send mailings to the Regional Office (e.g., time cards and pay checks). CSRs occasionally interact by phone with the Problem Resolution Center and with the Regional Parts Coordinator.<sup>6</sup> As noted above, though there are occasional meetings of CSRs in the same territory, and some CSRs occasionally work in a nearby area to provide specialized service or assist in large installations, CSRs from the entire Region do not attend conventions, training seminars, or similar integrated events. There is no internal Employer mailing system or message center. The Region finds that CSRs do not receive or utilize newsletters, trade magazines, or other publications of common interest, whether disseminated by the Employer or otherwise.<sup>7</sup>

The Employer leases and maintains forty (40) parts depots in the South Central Region for the storage of repair and replacement parts. CSRs visit parts depots to pick up and drop off parts, test equipment and technical

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<sup>5</sup> Without modem capability, the bricks do not permit CSRs to "surf the internet" or otherwise access other computer networks.

<sup>6</sup> The Parts Coordinator is responsible for ordering parts and maintaining an inventory in parts storage facilities located throughout the Region.

<sup>7</sup> It is unclear what forms the basis of this finding since there is no indication in the file to support the claim that CSRs do not receive newsletters, trade magazines or other publications of common interest.

and repair manuals. They might also use the parts depots to exchange parts with another CSR. The depots range from 50 square feet to 900 square feet, with the average depot approximately 200 square feet. The depots are storage rooms generally consisting of a room in an office building, a unit in a self-storage facility, or storage space in a strip mall.

**b. Union Campaign and Unit Determination**

In October 1994, CSR, Dennis Phillips, contacted the International Brotherhood of Electrical Workers, Local Union 111 (the Union) to discuss the possibility of organization. To this end, Phillips also used the brick to contact CSRs whose identification number were available to him. The CSRs contacted by Phillips worked within territory E and territory X. Combined, these territories encompass all of Colorado, the above-noted areas of Wyoming and Nebraska, and North East New Mexico.

Over the brick, Phillips asked CSRs for their telephone numbers and permission to contact them at home. Approximately 30 granted permission. Phillips then contacted the individuals at home and discussed organization. It was through these phone calls that Phillips learned the actual identities (as opposed to identification numbers) and addresses of other CSRs. In February, Phillips conveyed this information to Union agent, Rosemary Sheridan, who began to call and write CSRs as a part of a more formal Union organizing campaign.

On April 26, 1995, the Union had obtained sufficient authorization cards to support the petition in Case 27-RC-7557. In this petition, the Union sought to represent a unit consisting of all CSRs within the State of Colorado, excluding all other employees. On June 9, after a hearing in May, the Regional Director issued a Decision and Direction of Election in two units consistent with the Employer's territories E and X.

Pursuant to the Decision and Direction of Election, an eligibility list containing 63 names was supplied, ballots were mailed to employees on July 6, and a tally of ballots was to be conducted on July 20. On July 20, however, upon the Employer's Request for Review, the Board issued a Decision and Order reversing the Regional Director and

remanding for further processing. The Board found inappropriate any unit smaller than one encompassing the entire South Central Region.

As the original showing of interest submitted in support of the petition did not constitute 30 percent of the Region-wide unit, the Union was given until July 31 to submit an additional showing.<sup>8</sup> On July 28, the Regional Director denied a request by the Union for an extension of time to submit the additional showing of interest. As of July 31, the Union had not submitted a sufficient showing of interest in the Region-wide unit. On August 2, the Regional Director denied a Union Motion to Lower the Showing of Interest Requirement and dismissed the petition. On September 5, the Board denied the Union's request for review of the dismissal action.

Throughout the period when the representation petition was pending the Employer conducted an aggressive, but privileged, campaign against the Union which consisted of numerous letters and mailings to the employees' homes espousing the Employer's view of the disadvantages of unionization. Included among these mailings was a question and answer sheet dated April 18 which provided, inter alia, the Union's phone number in the event that an employee wanted to contact the Union to revoke his or her authorization card.

**c. Attempts to Communicate with CSRs  
in the Region-wide Unit**

By letter of July 25, the Union requested that the Employer provide the Union with:

1. Names, addresses, telephone numbers, facsimile machine numbers, computer modem addresses and electronic dispatch numbers . . . of all CSRs in the South Central Region; and
2. Reasonable access to the Employer's computerized wireless dispatch system and other electronic means of communications that the Employer has on occasion employed to communicate

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<sup>8</sup> Pursuant to CHM § 11114.4.

with CSRs of the South Central Region.

By letter of July 31, South Central Regional Manager, Tom Shackelford, denied the request in its entirety. The letter stated that the Employer had no legal obligation to disclose the requested information or provide access to communication systems. The letter further stated that disclosure of the information "would be an unwarranted invasion of the employees' privacy" and that the communication systems were "intended for the exclusive business use of [the Employer] and its employees."

Phillips also attempted to obtain from two Parts Coordinators CSR identification numbers for the balance of the Region. He was not successful, and he did not request the information from any supervisory personnel. The Union made no other effort to gain information about CSRs outside of territories E and X.

There is no evidence that the Employer has ever disclosed personal information regarding employees to any third party, to employees, or otherwise voluntarily compromised the "privacy" of its employees. There is also no evidence to suggest that any third party has ever been permitted such use of or access to the brick.

### **ACTION**

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer's refusal to provide the Union with a list of employee names and addresses violated Section 8(a)(1) of the Act.<sup>9</sup>

It is well settled that the rights granted under Section 7 of the Act include the right of employees to be informed about the advantages and disadvantages of self-organization.<sup>10</sup> The Supreme Court has stated that the

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<sup>9</sup> In our view, the issue regarding the Union's access to the brick depends in large part on whether the Employer is required to disclose a list of employee names and addresses to the Union. Therefore, this issue will be treated separately at the end of the discussion.

<sup>10</sup> Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972).

Section 7 right includes "both the right of union officials to discuss organization with employees and the right of employees to discuss organization among themselves."<sup>11</sup> The Court has further recognized that "the right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."<sup>12</sup> It is axiomatic, then, that in order for employees to be fully informed, unions need to be able to reach unorganized employees with their message about unionization. This important employee Section 7 right is frustrated if a union does not have reasonable means available to communicate its organizing message to employees.

Thus, in some circumstances the inherent nature of an employer's workplace or workforce might defeat all reasonable efforts by a union to reach employees. For instance, if an employer's employees reside throughout a wide geographic area and never report to a central location, but receive their assignments over the telephone or other communications device, then a union cannot reasonably be expected to reach those employees by using the traditional means of union organizing.<sup>13</sup>

It may be anticipated that recent economic, technological and demographic trends will dictate an increase in the number of situations where unions can no longer rely on the traditional means of organizing to reach employees with their message. For instance, the past several decades have seen a change from an industrial, manufacturing-based economy to a more service-oriented economy.<sup>14</sup> As a result, a growing number of employees in

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<sup>11</sup> Id. at 542 (emphasis added), citing Thomas v. Collins, 323 U.S. 516, 533-534 (1945).

<sup>12</sup> Id. at 543; NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

<sup>13</sup> The traditional means of union organizing include handbilling, picketing, advertising, home visits, etc.

<sup>14</sup> See, e.g. Stone, The Future of Collective Bargaining: A Review Essay, 58 U. Cin. L. Rev. 477 (1989).

the workforce no longer file in and out of the traditional factory gate for rigidly pre-determined shifts. Instead, many employees work at varied locations or worksites for the same employer, or travel from customer to customer to deliver their employer's services. In addition, the growing traffic problems faced in urban and densely suburban settings has lead to an increase in "flextime" -- where employees report to and depart from work at varying times. Finally, due to the increase in the use of personal computers, many employees now work from their homes and communicate with their workplace by telephone or computer modem.<sup>15</sup> Thus, a union's reliance on the predictability of reaching most employees at their workplace by handbilling at the workplace entrance or exit during "shiftchange," is diminished.

In addition, commentators have noted that changes in demographics effect a union's ability to organize. For instance, Chairman Gould has stated that one cannot "seriously speak of adequate or effective communication where the union must go to the workers, through any means, who are spread out in the cities, suburbs or rural areas."<sup>16</sup> In addition, Professor Bierman has noted that it has become "increasingly difficult" for unions to call on employees in their homes in recent years "with the growing tendency of employees to live, and many companies to locate, in the sprawling suburbs."<sup>17</sup> He further explained that "[e]mployees generally do not live in company towns or otherwise live together in close proximity to their

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<sup>15</sup> A 1993 report by the U.S. Department of Transportation estimates that 11 million workers will be telecommuting by the year 2000. See, also Sockell, The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality? 30 B.C. L. Rev. 987, 1000 (1989).

<sup>16</sup> Gould, Union Activity on Company Property, 18 Vand. L. Rev. 73, 102 (1964).

<sup>17</sup> Bierman, Toward a New Model for Union Organizing: The Home Visits Doctrine and Beyond, 27 B.C. L. Rev. 1, 10 (1985).

workplaces. This makes home visits difficult for unions under any circumstances."<sup>18</sup>

These workplace trends, which make it inherently difficult for a union to communicate with employees, impede the ability of employees to learn about self-organization and therefore deprives them of their Section 7 rights. Clearly, the more an employer's employees are individually dispersed over a wide geographic area, the more likely it is that a union will have no reasonable means of communicating with those employees. Therefore, the Board should require an employer to disclose employee names and addresses upon the request of a union where the union has no reasonable means of reaching employees with its message of self-organization. Unions possessing such a list will then be in a better position to communicate their message to employees through telephone calls, mailings of literature, or home visits, where applicable. The Section 7 rights of employees to learn about unionization would then be fully realized.

In this case, the evidence demonstrates that, without a list of employee names and addresses, the Union has no means of communicating its organizing message to the approximately 236 employees of the Employer. The employees employed in the South Central Region are widely dispersed throughout the eight states of Colorado, New Mexico, Kansas, Oklahoma, Missouri, Arkansas, and parts of Wyoming and Nebraska. These employees never appear at a central location. They all work out of their homes or cars and are dispatched via "the brick" -- the Employer's wireless personal computer system.<sup>19</sup> Contrary to the Employer's contentions, the media costs involved to contact employees spread out over such a large geographic area would be prohibitive.

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<sup>18</sup> Bierman, Extending Excelsior, 69 Ind. L. Jrnl. 521, 530 (1994).

<sup>19</sup> Although employees may contact other employees within the same territory, that is just a percentage of the employees in the entire South Central Region which the Board found to constitute the most appropriate unit.

Additionally, the 40 parts depots maintained by TSS do not provide an adequate means for the Union to reach employees.<sup>20</sup> The depots, too, are spread over a huge geographic area making it extremely difficult for the Union to provide sufficient coverage. In this regard, contrary to the Employer's assertion that most employees visit the depots every day, a review of the evidence provided by the Employer tends to show that the employees visit the parts depots on an unpredictable and erratic basis. Without sufficient regularity of employee visits to the depots, there is no way for the Union to adequately use the depots to convey its message, even if the Union otherwise could be expected to know where the 40 depots are located and be expected to cover them. Further, most of the depots are located in shopping centers, storage warehouses, or office buildings, implicating a host of problems involving access to those private properties. The Employer has offered no guarantee of Union access to its private property at any of these parts depots in order to facilitate the Union's ability to communicate with its employees.

Further, it is clear that the Union made a serious effort to reach the Employer's employees. The Union had sufficiently organized the employees of Territories E and X to enable it to file a representation petition for those territories. However, the 63 employee names and addresses obtained during that organizing drive would not constitute a sufficient showing of interest for the larger Board-determined unit of 236 employees. Although employee Phillips, the Union's primary activist, attempted to obtain information about fellow employees in the larger unit from two of the Employer's Parts Coordinators, they refused to

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<sup>20</sup> We also reject the Employer's argument that it obviated the need for the Union to obtain employee names and addresses since the Employer already provided the Union's phone number to all the employees. As noted above, as part of the Employer's aggressive anti-Union campaign it provided the employees with the Union's phone number in the event an employee wanted to revoke his or her authorization card. We do not view the Employer's disclosure of the Union's phone number to employees, particularly in the context in which it was divulged, as an adequate Union organizing tool such that it should preclude the Union from obtaining employee names and addresses.

help. In the circumstances of this case, there was nothing else the Union could do to identify other employees.

It is clear that the workplace situation here is such that the Union has no means of reaching the employees. Thus, this case presents similar circumstances to the "classic" examples where, in another context, the Board and Supreme Court recognized the need to grant unions access to employer private property.<sup>21</sup> Without a Board remedy requiring the Employer to provide employee names and addresses, the Union will never be able to contact the employees with its organizing message, and the employees will be deprived of their Section 7 right to learn about unionization.<sup>22</sup> For this reason, the Employer should be required to disclose employee names and addresses to the Union. Further, since the Employer has not asserted a legitimate countervailing interest in keeping the names and addresses secret, the failure to disclose the names and addresses interferes with employee Section 7 rights and is a violation of Section 8(a)(1) of the Act.

This case raises an issue of first impression. The Board has never before squarely addressed whether an employer commits an unfair labor practice by failing to disclose names and addresses to a union prior to the scheduling of an election. However, the Board's analysis

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<sup>21</sup> See Lechmere, 502 U.S. 527, 539 (1992), citing NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948); Alaska Barite Co., 197 NLRB 1023 (1972), enfd. mem. 83 LRRM 2992 (9th Cir.), cert. denied 414 U.S. 1025 (1973); NLRB v. S & H Grossinger's Inc., 372 F.2d 26 (2d Cir. 1967). See, also G.W. Gladders Towing Co., 287 NLRB 186 (1987); North Star Drilling Co., 290 NLRB 826 (1988).

<sup>22</sup> Although the inaccessibility of the employees in the instant cases is analogous to those cited in the preceding footnote, the principles espoused in those cases are not applicable. Those cases resolve the problem presented when a union seeks access to an employer's real property. Here, the Union does not seek entry onto the Employer's property. The Union merely seeks *information* which is in the possession of the Employer.

in the seminal case of Excelsior Underwear Inc.<sup>23</sup> may be instructive. In that case, the Board considered, inter alia, whether "a fair and free election [can] be held when the union involved lacks the names and addresses of employees eligible to vote in that election, and the employer refuses to accede to the union's request therefor?"<sup>24</sup> In that case, the Board held that in a representation proceeding an employer must provide a petitioning union with a list of employee names and addresses "within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties" or after "the Regional Director or the Board has directed an election . . . ."<sup>25</sup> The Board primarily based its decision on its view that,

As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and as a result, employees are often completely unaware of that point of view.<sup>26</sup>

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<sup>23</sup> 156 NLRB 1236 (1966).

<sup>24</sup> Id. at 1238. The Excelsior case was consolidated and heard with K. L. Kellogg & Sons.

<sup>25</sup> Id. at 1239.

<sup>26</sup> Id. at 1240-41 (citations omitted). In addition, the Board relied upon its belief that "[p]rompt disclosure of employee names as well as addresses will . . . eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity." Id. at 1243.

It is significant that in Excelsior the Board considered and rejected numerous arguments from the employers and amici curiae against disclosure of employee names and addresses. In this regard, the Board found that "no substantial infringement of employer interests would flow from such a requirement."<sup>27</sup> Specifically, "the Board found that a list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret . . . ." <sup>28</sup> In addition, the disclosure of employee names and addresses does not infringe on employees' Section 7 rights, or subject employees to "the dangers of harassment and coercion in their homes."<sup>29</sup> Finally, since it found no "significant employer interest," the Board also rejected the argument that disclosure of employee names and addresses should be governed by the analysis applicable to grant or deny unions access to private property. In this regard, the Board stated that "[the Babcock analysis] is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest -- such as the employer's interest in controlling the use of property owned by him." <sup>30</sup>

The Board's reasoning in Excelsior in response to the employer arguments raised therein is no less applicable here. In the instant case, the disclosure would be required at a much earlier stage in the organizing process than that required by Excelsior. However the information to be disclosed, and therefore the employer interests involved, are identical.<sup>31</sup>

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<sup>27</sup> 156 NLRB at 1243.

<sup>28</sup> Ibid.

<sup>29</sup> Id. at 1244.

<sup>30</sup> Id. at 1245.

<sup>31</sup> In Excelsior, the Board did address the potential for "misuse of the Board's processes" if "a union might petition for an election with no real intention of participating therein, but solely to obtain employee names and addresses, intending, on receipt thereof, to withdraw

In addition to the employer arguments addressed by the Board in Excelsior, there is no evidence that the Employer has a commercial interest in its list of employee names and addresses.<sup>32</sup> And, as further resolved in Excelsior, an employer does not possess a significant secrecy interest in its employees' names and addresses.<sup>33</sup> In this case, the Employer has not presented evidence to demonstrate that its employee list warrants special confidentiality considerations.

Moreover, it does not appear that the employees have any particular interest in keeping the list of names and addresses secret. The Board has already held that

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the election petition and utilize its newly acquired information as a basis for further organizational efforts." 156 NLRB 1244, fn. 20. In our view, the "misuse" the Board sought to avoid is not union efforts to obtain employee names and addresses for the purpose of organizing. Instead, it appears that the Board was concerned with the improper and untimely invocation of the Board's election machinery, and the concomitant waste of Board resources, under the auspices of a petition for an election when the genuine goal is to obtain a list of employee names and addresses.

<sup>32</sup> See People Care, 299 NLRB 875 (1990), where the Board rejects the argument that a list of employee names and addresses should be withheld from a Section 9(a) representative as a confidential trade secret. Cf. Feist Publications Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 338 (1991) (compilation of names and addresses for use in telephone directory is not copyrightable); R&R Associates of Pinellas County v. Armendinger, 119 Bankruptcy Reporter 302, 304 (U.S. Bankruptcy Ct., M.D. Fla. 1990) (in order for a customer list to be considered a trade secret it must reflect considerable effort, knowledge, time and expense on the part of the employer) and Defiance Button Machine Co. v. C&C Metal Products, 759 F.2d 1053, 1063 (2d Cir. 1985) (citing, inter alia, Restatement of Torts, Section 757, comment b).

<sup>33</sup> Excelsior, 156 NLRB at 1245.

intrusion into employee privacy resulting from disclosure of names and addresses is minimal, if any.<sup>34</sup> Further, even assuming arguendo that the Employer considers the names and addresses confidential because they are not otherwise available to anyone but the Employer, we would argue that, on balance, the asserted confidentiality interest would not outweigh the strong Section 7 considerations in favor of disclosure, especially since there is no articulated business justification for keeping the names and addresses secret.<sup>35</sup>

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<sup>34</sup> Marlene Industries, 166 NLRB 703, 705 (Board, ordering employer to provide union with names and addresses to remedy flagrant unfair labor practices committed during organizing campaign finds "any resultant intrusion into the right of privacy of employees will be minimal since such employees are free to refuse home visits or telephone calls by union organizers"); Armstrong World Industries, Inc., 254 NLRB 1239, 1245 (Board rejects any employee right of privacy claim in light of interest in Section 9(a) representative in receiving information).

<sup>35</sup> The Board has vast experience in balancing the legitimate but competing interests of the parties whom it serves. See, e.g., Retail Associates, 120 NLRB 388 (1958) (Board balances right of unions and employers to associate freely with others in bargaining relationships, or to refrain from or withdraw from such associations, against fundamental purpose of Act of fostering and maintaining stability in bargaining relationships); Detroit Newspaper Agency and Detroit Free Press, 317 NLRB 1071 (June 30, 1995) (Board balances Section 9(a) union's need for relevant information against employer's asserted confidentiality interest); Yellow Freight Systems, Inc., 317 NLRB 115 (1995) (Weingarten requires Board to balance right of employer to investigate conduct of an employee and the right of the employee to have union representation during investigation); Aroostook County Regional Ophthalmology Center, 317 NLRB 218 (1995) (Board balances employer right to provide uninterrupted patient care against rights of employees to discuss or solicit union representation); and Holyoke Water Power Co., 273 NLRB 1369, enfd. 778 F.2d 49 (1st Cir. 1985) (Board must balance right of Section 9(a) union to have access to employer property in order to

Although the Board has never addressed whether an Employer should be required to disclose employee names and addresses during an organizing drive,<sup>36</sup> we are aware that the Board has, in dicta, indicated that there presently exists no such requirement. For instance, in Pike Co.,<sup>37</sup> the Board was presented with the issue of when, in the construction industry, it should determine the number of employees in a unit for purposes of demonstrating a sufficiency of interest. In its discussion, the Board noted that "an employer is under no obligation prior to issuance of the Regional Director's decision directing compliance with Excelsior Underwear to supply a petitioner with a list of eligible employees."<sup>38</sup> In Gray Flooring,<sup>39</sup>

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obtain health and safety information against the employer's property right).

<sup>36</sup> This precise issue was raised and addressed in Metro Care Services, Inc., et al., Case 2-CA-24003, et al., Advice Memoranda dated September 4 and October 31, 1990. In those cases, involving home health care workers similar to those at issue here in Okanogan, Advice authorized dismissal of the charges based on the conclusion that the employers had no obligation to provide names and addresses to the union. Advice approached the Metro Care cases applying established Board law. For instance, Advice concluded that the employers need not provide employee names and addresses since the requesting unions were not Section 9(a) representatives of the employees (citing, inter alia, Standard Oil Co. of California, 166 NLRB 343 (1967), enfd. 399 F.2d 639 (9th Cir. 1968)); the Board need not order the employers to provide names and addresses where the employers had not engaged in a pattern of unfair labor practices (citing, inter alia, J.P. Stevens and Co., Inc., 157 NLRB 869, 878 (1966)), and the evidence in Metrocare demonstrated that the unions had alternative means of communicating with the employees (citing, Jean Country, 291 NLRB 11 (1988)). Apparently, Advice did not consider whether the cases raised a novel issue which should be put to the Board.

<sup>37</sup> 314 NLRB 691 (1994).

<sup>38</sup> Id. at 691.

the Board, finding that an employer violated Section 8(a)(3) by discharging an employee for copying employee names and addresses, stated that an employer has no obligation to provide a union with names and addresses for organizing.<sup>40</sup> Finally, in Monogram Models, Inc.,<sup>41</sup> where a majority of the Board found lawful an employer's refusal to allow union organizers on its property, the Board rejected a dissenting member's suggestion that the employer's refusal to disclose employee names and addresses contributed to the union's difficulties in reaching employees. In response to dissenting member Brown, the Board majority stated that "the principles established by the Excelsior case were designed by this Board to provide assurances of access to employees at what was deemed an appropriate point in our election processes."<sup>42</sup> This statement might suggest that the Monogram Models Board may have considered any earlier disclosure of employee names and addresses an improper requirement. However, despite their dicta, neither Pike Co., Gray Flooring, nor Monogram Models actually raised the question of *whether* the Board should require an employer to provide a union with names and addresses for organizing. In each case, the Board was merely stating the current state of the law. Clearly, there is no such obligation until the Board so holds.<sup>43</sup>

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<sup>39</sup> 212 NLRB 668 (1974).

<sup>40</sup> Id. at 669.

<sup>41</sup> 192 NLRB 705 (1971).

<sup>42</sup> Id. at 706-707 (citation omitted).

<sup>43</sup> In Pepsi-Cola Co., 307 NLRB 1378 (1992), the charging party union did file a charge protesting the employer's refusal to provide employee names and addresses to aid the union in organizing the employer's employees. Id. at 1384. However, that claim was apparently not alleged in the complaint. Ibid. Nevertheless, the ALJ, acknowledging that the allegation regarding the employer's refusal to provide a list was not before it, did state that "[t]here is no requirement that it do so." Id. at 1385. Again, this statement in dicta is not controlling since the issue was neither argued nor briefed. Moreover, in that case,

In addition, the Board has considered whether an employer's failure to provide an Excelsior list pursuant to a decision and direction of election is an unfair labor practice. In Shop Rite Foods,<sup>44</sup> the Board affirmed the administrative law judge's decision rejecting the argument that the failure to provide an Excelsior list is an unfair labor practice. In that case, the ALJ relied primarily upon the Board's adoption of the Excelsior rule as a pre-election tool. Non-compliance with the rule, therefore, was remedied by setting aside the election and ordering a re-run election. The ALJ saw no use for an unfair labor practice remedy in that setting.<sup>45</sup> Thus, the ALJ did not consider -- as it was not before him -- the utility of an unfair labor practice remedy to disclose the list of employee names and addresses to a union in an initial organizing posture. Moreover, to the extent the judge considered whether the Board should presume that a failure to provide a list would interfere with employees' Section 7 rights,<sup>46</sup> he failed to appreciate the Supreme Court's reliance on such presumptions.<sup>47</sup>

[FOIA Exemptions 2 and 5]

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the Board granted the General Counsel's motion to subsequently withdraw the charge containing the pertinent allegation. See, *Id.* at 1378, fn. 2.

<sup>44</sup> 216 NLRB 256 (1975).

<sup>45</sup> *Id.* at 259.

<sup>46</sup> *Id.* at 260.

<sup>47</sup> See, e.g. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945) (An administrative agency . . . may infer . . . such conclusions as reasonably may be based upon the facts proven).

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In the instant case, the Employer refused the request of the Union for disclosure of employee names and addresses, even though the Union had no other reasonable means of communicating with the employees. In these circumstances, the Employer's refusal interfered with the employees' right to learn about self-organization. In light of these considerations, and in the absence of any contrary authority, the Region should issue complaint in this case to put before the Board the novel issue of whether the Employer violated Section 8(a)(1) by refusing to provide the Union with a list of employee names and addresses, upon request, when the Union has no reasonable alternative means of communicating its organizing message to the employees.

As to the "brick," we see no need to require the Employer to turn over its telecommunications device to the Union. Once the Union obtains the employee names and addresses in accordance with the analysis set forth above, then it has a reasonable means of communicating with the Employer's employees. The Union has made no showing that the Employer's denial of Union access to the brick would further interfere with employee Section 7 rights. Therefore, the Region should dismiss, absent withdrawal, the allegation of the charge pertaining to the brick.

B. J. K.

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<sup>48</sup> [FOIA Exemptions 2 and 5

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